Supreme Court, U.S.
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No. 99-957

In The

# Supreme Court of the United States

DENISE CHAMBLEY; JANE GAULDING and WILLENE HAMMOCK, as Co-Executrixes of the Estate of EUGENE BARTON ELLIOTT,

*Petitioners,*

v.

PIKE COUNTY, GEORGIA; ROBERT CURTIS; THOMAS LACEY; W. A. OLIVER; JAMES LESTER; MONROE PILKENTON; PHILLIP HANSON; JAKE GARNER; and JOHN ATKINS, individually, and in their official capacities as Pike County Commissioners,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(I) Whether governmental takings of unimproved real property implicate the Fourth Amendment's seizure clause.

(II) Whether there is a need for independent substantive due process analysis, separate from the Fifth Amendment takings clause, of a claim that a governmental taking was not for a public purpose.

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## OPINIONS AND JUDGMENT BELOW

As Appendix B to their Petition for Writ of Certiorari, Petitioners have provided the Order of the Honorable Jack T. Camp, Judge, United States District Court for the Northern District of Georgia (hereinafter referred to as the "district court"), entered March 25, 1998. Petitioners also included as Appendix A the July 9, 1999 *per curiam* affirmance of the United States Court of Appeals for the Eleventh Circuit (hereinafter referred to as the "Eleventh Circuit") in *Chambley, et al. v. Pike County, Georgia, et al.*, No. 98-8522 (11th Cir. July 9, 1999). Finally, Petitioners included as Appendix C the Eleventh Circuit's *per curiam* denial of Petitioners' Petition for Rehearing and Rehearing *En Banc*, filed September 2, 1999.

## STATEMENT OF JURISDICTION

Respondents agree with Petitioners' representation that jurisdiction of this Court is conferred by reason of 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree that this application for writ of certiorari involves the Fourth Amendment, Fifth Amendment and Fourteenth Amendment to the Constitution of the United States and Federal Rule of Civil Procedure 12(b)(6).

## STATEMENT OF THE CASE

For purposes of Respondents' Rule 12(b)(6) motion to dismiss only, Respondents accepted the facts contained in Petitioners' complaint filed in this matter. At issue in this case is the ownership of a small strip of unimproved realty known as Curtis Road. Petitioners claim that Curtis Road represents an easement or a license given by the Elliott family to the Curtis family many, many years ago to serve as a driveway for the Curtis family. According to Petitioners, Curtis Road has never been a public road and has always been owned by one or more members of the Elliott family. Allegedly, sometime after 1986, Pike County began maintaining Curtis Road and, on occasion, Elliott family members interfered with this maintenance by telling county personnel to leave their property. Finally, in 1996, Pike County paved Curtis Road, allegedly against Petitioners' wishes.

In their complaint, Petitioners asserted two claims that are at issue in this appeal: first, Petitioners argued that the Fourth Amendment applies to the facts of the instant case and, second, they argued that Respondents' action of "taking" Curtis Road by the act of paving it violated their Fourteenth Amendment substantive due process rights. In making these claims, Petitioners affirmatively denied they were asserting any claim under the Fifth Amendment takings clause.

In lieu of filing an answer, Respondents filed a Rule 12(b)(6) Motion to Dismiss Petitioners' federal law claims. On March 25, 1998, the district court granted Respondents' motion, and on April 23, 1998, Petitioners filed their Notice of Appeal to the Eleventh Circuit. After oral

argument, the Eleventh Circuit affirmed without opinion the district court's order on July 9, 1999. Thereafter, the Eleventh Circuit denied Petitioners' Petition for Rehearing and Petition for Rehearing *En Banc*.

## SUMMARY OF THE ARGUMENT

While Petitioners do not reference Rule 10 of this Court's Rules in their petition or even argue that this case merits review for any of the reasons set forth in Rule 10, it appears that review is sought pursuant to subsection (c). That is, Petitioners apparently contend that the Eleventh Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Specifically, Petitioners ask this Court to grant review of this case because it is allegedly a case of first impression and because Petitioners contend there is a need for certain "bright-line" rules in the context of eminent domain cases. Those "bright-line" rules, Petitioners suggest, are as follows: (1) the Fourth Amendment is always implicated when the government takes real property for a non-public use; (2) Fourth Amendment "search" jurisprudence is inapplicable to "seizure" analysis; and (3) the substantive due process clause of the Fourteenth Amendment, and not the Fifth Amendment's takings clause, governs a government's taking of real property for a non-public use. (Petition for Writ of Certiorari at 7, 14.) Petitioners' contentions are misguided.

Certiorari should not be granted because the questions Petitioners present are simply not appropriate for

this Court's review. More to the point, this is not a case of first impression, as this Court has considered many eminent domain cases, including those where the "public use" component of the Fifth Amendment was being challenged. Furthermore, the law is clear, as the district court and the Eleventh Circuit determined, that the Fourth Amendment is not applicable to governmental "takings" involving real property. Indeed, this Court has already reached the issue of the applicability of the Fifth Amendment takings clause to governmental takings cases, and declined to apply the more generalized notion of the Fourteenth Amendment's substantive due process clause. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Thus, there simply is no special and important reason for granting Petitioners' application for writ of certiorari.

## ARGUMENT

Petitioners' petition to this Court fails to demonstrate any compelling reason for this Court to issue a writ of certiorari in this case. Rule 10 of this Court's Rules provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of

> appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955), this Court discussed the dimensions of its discretionary review and why cases, such as this one, are not among those for which such review will be granted:

> [W]e have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari, as required by Supreme Court Rule 19, 28 U.S.C.A.

* * *

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

*Rice*, 349 U.S. at 616 (citations omitted).

Petitioners herein essentially argue that the Eleventh Circuit was wrong when it decided that a taking of private land by a government does not implicate the Fourth Amendment and that the substantive due process clause of the Fourteenth Amendment is inapplicable because there is an explicit textual provision of the Constitution (i.e., the Fifth Amendment) that directly addresses harm allegedly suffered by Petitioners. Creatively, Petitioners claim that the facts of this case present a case of first impression for this Court, perhaps in an effort to avoid the stringent requirements of Rule 10. There is not a shred of validity to this contention, however, because every issue in this case has previously been addressed adversely to Petitioners, both by this Court, and by lower courts.

Not only is this a case of first impression, Petitioners' argument goes, but this Court must also take this case in order to develop bright-line rules regarding the Fourth

Amendment's applicability to governmental exercise of the power of eminent domain, and to declare that Fourth Amendment "search" jurisprudence is inapplicable to "seizure" cases. With reference to their Fourteenth Amendment substantive due process claim, Petitioners assert that this Court should grant their application for a writ of certiorari in order to declare that the substantive due process clause of the Fourteenth Amendment applies to a takings claim where the taking was for an alleged invalid public purpose. None of these arguments has any merit.

## A. THE FOURTH AMENDMENT DOES NOT APPLY TO GOVERNMENTAL SEIZURES OF REAL PROPERTY

The district court determined that the Fourth Amendment simply does not apply under the facts alleged in Petitioners' complaint. Were the Fourth Amendment to apply, the court determined, "then every Fifth Amendment takings claim would also invoke the Fourth Amendment[ ] . . . [and] would relegate the Fifth Amendment takings clause, and its exhaustion requirement, to mere surplusage." (R1-12-8.) Contrary to Petitioners' argument, the district court was not making a *choice* between amendments. Rather, it was simply pointing out how illogical it would be to apply the Fourth Amendment to an allegation that a local government "took" a citizen's real property.

As suggested by the district court, the Framers of the Constitution specifically provided for cases such as this

one by drafting the Fifth Amendment. It is beyond contention that in a typical land use case, when a property owner alleges that the government has restricted his use of his property to such an extent that it has effectively "taken" that property without adequate compensation, the property owner's Fifth Amendment right has been implicated. *See Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985). Petitioners stand in no different position than plaintiffs in zoning cases. As such, Petitioners' rights, if any, flow from the Fifth Amendment. Petitioners, however, make no claim for violation of their Fifth Amendment rights. To the contrary, they affirmatively stated they were not making such a claim.

The specific language of the Fourth Amendment itself illustrates that it does not apply to the facts of the instant case. The Fourth Amendment provides:

> The right of the people to be secure in their **persons, houses, papers, and effects**, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. (Emphasis added.) Land, without more, is not a person, house, paper or effect.

In *Oliver v. United States*, 466 U.S. 170 (1984), this Court specifically addressed the reach of the Fourth Amendment to real property. In analyzing whether a search of an open field was proper, the Court looked to the explicit language of the Fourth Amendment, which "indicates with some precision the places and things encompassed by its protections." *Oliver*, 466 U.S. at 176.

Because the amendment does not refer to "open fields," this Court did not apply it to the case. Here, too, unimproved real estate is nowhere referred to in the Fourth Amendment.

This Court in *Oliver* considered "open fields" to be the same thing as "real property." In discussing the issue of open fields, this Court commented that open fields could not be considered to be "effects" because the term "effects" is "limited to personal, rather than **real property**." *Oliver*, 466 U.S. at 177 fn.7 (emphasis added). If real property is not protected from unreasonable *searches* under the express terms of the Fourth Amendment, neither is it protected from unreasonable *seizures*. Again, that is the province of the Fifth Amendment.

Furthermore, the Fourth Amendment does not provide an absolute protection against all searches and seizures. Rather, it protects only those searches and seizures undertaken without "probable cause, supported by Oath or affirmation and particularly describing the . . . things to be seized." If, as Petitioners suggest, the Fourth Amendment were to apply to the governmental power of eminent domain, then the amendment would require the government to secure a warrant, based on probable cause, describing the property to be taken. This is totally illogical. A government need not go through this procedure in order to obtain land from a citizen because "[t]he power of eminent domain is a fundamental and necessary attribute of sovereignty, superior to all private property rights." *Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) (citing *Georgia v. City of Chattanooga, Tenn.*, 264 U.S. 472, 480 (1924)). The only

constitutional requirements are that the taking be for a public purpose and that just compensation be given for the land seized. Those requirements, however, flow from the Fifth, and not the Fourth, Amendment. U.S. CONST. amend. V; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239-41 (1984).

Petitioners' cited authority, *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992), is distinguishable on its facts. *Soldal* involved defendant law enforcement officers assisting with the process of "physically tearing" plaintiffs' *trailer home* out of the ground and moving it to another location. *Soldal*, 506 U.S. at 72. Because the Fourth Amendment specifically refers to "houses," this Court had little trouble holding that the Fourth Amendment was implicated. That is not the case here. Petitioners' home was not taken away, a small strip of real property allegedly was. The Fourth Amendment simply does not refer to seizures of real property, and there is no legal justification for extending it beyond its express terms.

The second argument Petitioners advance for why this Court should grant their petition is that the district court and the Eleventh Circuit improperly focused on the "search" aspect of the Fourth Amendment, instead of the "seizure" aspect. In other words, Petitioners attempt to make a distinction between limits placed on "places" that can be searched as opposed to "items" that can be seized. Again, there simply is no legal support for this distinction.

To illustrate their contention, Petitioners cite to *Oliver, supra*, wherein this Court held that "open fields" were not protected by the Fourth Amendment because,

among other things, there could be no expectation of privacy in the open field. Petitioners reasoned that it was improper for the district court to rely on *Oliver* because this was a "search" case that concerned an analysis of an expectation of privacy. (Petition for Writ of Certiorari at 10-11.) However, this Court also held that Fourth Amendment protection was inapplicable because "open fields" were not referred to in the text of the amendment, as discussed by Respondents *infra*. There is no "confusion" regarding the application of *Oliver* by lower courts, as Petitioners argue. Therefore, this issue cannot possibly constitute the "special and important" reasons required by this Court in granting an application for writ of certiorari.

No matter how much Petitioners stretch and strain, they cannot change the fact that this is nothing more than an eminent domain case. An entire body of law has now been built up by this Court in analyzing such claims, and it all comes from the Fifth Amendment. Why Petitioners chose not to assert a claim under the Fifth Amendment is a matter about which Respondents can only speculate. It is a matter, however, that need not trouble the Court.

Petitioners are simply trying to put a square peg in a round hole and, in doing so, claiming that this case is one of first impression. Saying it is does not make it so, however. Indeed, the fact that Petitioners eschewed the Fifth Amendment in pleading their case in favor of the Fourth does not make this a case of first impression any more than if Petitioners had attempted to claim their First Amendment rights were somehow involved. The Petition should be denied.

## B. THE FIFTH AMENDMENT'S TAKINGS CLAUSE PROVIDES AN EXPLICIT CONSTITUTIONAL SOURCE FOR ANALYSIS OF PETITIONERS' CLAIM THAT THEIR REAL PROPERTY WAS NOT TAKEN FOR A PUBLIC PURPOSE

Petitioners' final argument to this Court is that it is an issue of first impression whether the Fourteenth Amendment's substantive due process clause applies in a case when the government allegedly takes private property for private, as opposed to public, use. This issue is certainly not one of "first impression," since it was definitively answered by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Plaintiff in *Dolan* was contesting the city's conditional approval of her application to expand her commercial property which required that she dedicate land for a greenway and for a pedestrian/bicycle pathway. *Id.* at 377-381. The majority of this Court specifically rejected the notion that such a controversy was grounded in the substantive due process clause. To the contrary, it adopted the view that such a claim was included within traditional takings clause analysis of the Fifth Amendment. *Id.* at 384 n.5. Indeed, this Court spent nearly ten (10) pages of its opinion determining whether the taking at issue had been for a legitimate public purpose, as required by the Fifth Amendment. *See also, Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984) (courts can invalidate compensated taking of property for lack of a justifying public purpose); *Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) (power of

eminent domain is fundamental and is circumscribed by "public use" requirement of the Fifth Amendment made applicable to the states through the Fourteenth Amendment).

To assert that the Fifth Amendment does not apply to a case in which it is alleged that there has been a governmental taking for an illegitimate public purpose is, at best, frivolous. There is no need for this Court to entertain Petitioners' appeal because the law is perfectly clear that Fifth Amendment analysis could have been used to address Plaintiffs' claims.

The rationale behind limiting a "takings" controversy to the explicit text of the Fifth Amendment is made clear by case law. Substantive due process protects those rights which are fundamental and protected "against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (internal quotation marks omitted). Areas in which substantive rights are created only by state law are not fundamental and do not qualify for substantive due process protection. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994). Therefore, "state law based rights constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed." *Id.*

It is well established that land use rights, as property rights, are state created rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *McKinney, supra.* As this Court stated, "the Constitution does not create property interests. Rather it extends various procedural

safeguards to certain interests 'that stem from an independent source such as state law.' " *Leis v. Flynt*, 439 U.S. 438, 441 (1979) (quoting *Board of Regents v. Roth, supra*).

Furthermore, this Court has indicated that when an explicit textual provision of the Constitution (i.e., the takings clause of the Fifth Amendment) protects against the area of governmental conduct challenged by plaintiffs, plaintiffs are precluded from obtaining relief under the generalized notion of substantive due process. *Albright v. Oliver*, 510 U.S. 266, 274-76 (1994). *See also, Bickerstaff Clay Prods. Co. v. Harris County, Ga.*, 89 F.3d 1481, 1490 (11th Cir. 1996) (plaintiff's substantive due process claim subsumed by its takings clause claim because Framers of Bill of Rights did not intend to replicate by implication the substantive rights of the Fifth Amendment into the due process clause of the Fourteenth Amendment).

In short, Petitioners' state law created property interest is protected, if at all, by the Fifth Amendment, and not by the substantive due process clause of the Fourteenth. The fact that Petitioners chose not to assert a Fifth Amendment claim does not change this result.

## CONCLUSION

The Petition for Writ of Certiorari should be denied in this matter because the justiciable concerns required by Rule 10 of the rules of this Court are absent. There is no need for this Court to proclaim or re-examine these issues because they have already been decided, albeit adversely

to Petitioners. An examination of the allegation of Petitioners' complaint and the applicable law is all that is needed. Petitioners' attempt to transform this case into something that it is not should be rejected.

The lower courts properly applied Fed. R. Civ. P. 12 in holding that Respondents were entitled to have Petitioners' claims dismissed as a matter of law. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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